

No. 22-56012

In the
**United States Court of Appeals
for the Ninth Circuit**

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

TRIANGLE MEDIA CORPORATION, *et al.*,

Defendants-Appellees.

v.

WELLS FARGO & COMPANY and WELLS FARGO BANK, N.A., proposed

Intervenors,

Movants-Appellants,

THOMAS W. McNAMARA,

Receiver-Appellee.

On Appeal from the United States District Court

for the Southern District of California

The Honorable Larry Alan Burns

Case No. 3:18-cv-01388-LAB-WVG

**VOLUME I OF III – EXCERPTS OF RECORD OF APPELLANTS
WELLS FARGO & COMPANY AND WELLS FARGO BANK, N.A.**

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March 8, 2023

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRIANGLE MEDIA CORPORATION;
JASPER RAIN MARKETING LLC;
HARDWIRE INTERACTIVE INC.;
GLOBAL NORTHERN TRADING
LIMITED; BRIAN PHILLIPS; and
DEVIN KEER,

Defendants.

Case No.: 18-cv-1388-LAB-WVG

**ORDER DENYING MOTION TO
INTERVENE [Dkt. 153]**

Wells Fargo & Company and Wells Fargo Bank, N.A. (collectively, “Wells Fargo”) is a non-party proposed intervenor seeking to have this Court vacate its November 18, 2019 Order authorizing the Court-appointed Receiver, Thomas McNamara (“Receiver”), to pursue litigation against Wells Fargo for over \$160 million in monetary damages owed by the named Defendants in this case. Wells Fargo argues that, per the Supreme Court’s ruling in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), the Federal Trade Commission (“FTC”) lacks the authority to obtain equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

1 The Court has read and considered all materials submitted in support of and
2 in opposition to Wells Fargo’s Motion to Intervene (“Motion”). For the reasons
3 stated herein, the Motion is **DENIED**. (Dkt. 153).

4 **I. BACKGROUND**

5 In June 2018, the FTC brought an enforcement action against Brian Phillips
6 and Devin Keer, as well as their web of companies, including Triangle Media
7 Corporation, Jasper Rain Marketing, LLC, Hardwire Interactive, Inc., and Global
8 Northern Trading Limited (collectively, “Defendants”). (Dkt. 1). The FTC alleged
9 that Defendants were engaged in a multi-level scheme to sell trial offers of
10 discounted skincare products, electronic cigarettes, and dietary supplements
11 online in order to obtain consumers’ credit and debit card information and instead
12 enroll them in a continuity program, charging them a recurring fee on a monthly
13 basis without their knowledge or consent. (*Id.* ¶ 12). The FTC sought, amongst
14 other remedies, equitable monetary relief under Section 13(b) of the FTC Act,
15 U.S.C. § 53(b); Section 5 of the Restore Online Shoppers’ Confidence Act
16 (“ROSCA”), 15 U.S.C. § 8404; and Section 918(c) of the Electronic Fund Transfer
17 Act (“EFTA”), 15 U.S.C. § 1693o(c). (*Id.* ¶ 1).

18 On June 29, 2018, United States District Judge Michael Anello partially
19 granted the FTC’s request for a Temporary Restraining Order (“TRO”) and
20 temporarily appointed the Receiver to oversee, seize, and manage Defendants’
21 assets (“TRO Order”). (Dkt. 11).¹ In doing so, the Court ruled that it “has the
22 authority to issue this order pursuant to Section 13(b) of the FTC Act; 15 U.S.C.
23 § 53(b); Fed. R. Civ. P. 65; and the All Writs Act, 28 U.S.C. § 1651.” (Dkt. 11 at 5).
24 The Court empowered the Receiver “to sue for, collect, and receive, all Assets of
25 the Receivership Entities and of other persons or entities whose interests are now
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28 ¹ Judge Anello presided over this matter until his recusal in November 2018,
following which this Court assumed jurisdiction over the matter. (See Dkt. 88).

1 under the direction, possession, custody, or control of, the Receivership Entities.”
2 (*Id.* at 19). It also authorized the Receiver to “[i]nstitute, . . . or otherwise become
3 party to any legal action in state, federal or foreign courts or arbitration
4 proceedings as the Receiver deems necessary and advisable to preserve or
5 recover the Assets of the Receivership Entities, or to carry out the Receiver’s
6 mandate under this Order, including actions challenging fraudulent or voidable
7 transfers.” (*Id.* at 21).

8 On August 24, 2018, Judge Anello issued a preliminary injunction, enjoining
9 Defendants’ deceptive business practices and making the Receiver’s appointment
10 permanent. (Dkt. 74, 75). The Ninth Circuit affirmed the preliminary injunction on
11 appeal. (Dkt. 119). Thereafter, on May 30, 2019, the parties entered into two
12 settlements that fully resolved all of the FTC’s claims against Defendants.
13 (Dkt. 121, 126–27). The Court accepted the settlements and entered a Modified
14 Stipulated Order for Permanent Injunction and Monetary Judgment in the amount
15 of \$48,110,267.14 in equitable monetary relief as to Defendants Triangle Media
16 Corporation, Jasper Rain Marketing, LLC, and Brian Phillips, (Dkt. 126), and
17 \$123,095,438.18 in equitable monetary relief as to Defendants Hardwire
18 Interactive Inc., Global Norther Trading Limited, and Devin Keer, (Dkt. 127).

19 On November 18, 2019, this Court issued an order granting the Receiver’s
20 motion to extend the receivership for the sole purpose of pursuing litigation against
21 Wells Fargo, and administratively closing this case while that litigation is pursued
22 (“November 2019 Order”). (Dkt. 142). On July 8, 2021, the Receiver brought suit
23 against Wells Fargo in this District in *McNamara v. Wells Fargo & Co.*, 3:21-cv-
24 01245-LAB-DDL (S.D. Cal. July 8, 2021) (“Wells Fargo Litigation”), seeking, in
25 part, the return of funds acquired by Wells Fargo through allegedly fraudulent
26 transfers and/or unjust enrichment at the expense of the Receivership Entities,
27 as well all applicable damages proximately caused by Wells Fargo’s allegedly
28 tortious conduct, including punitive damages. (Dkt. 154, Request for Judicial

1 Notice (“RJN”), Ex. C).² The Complaint against Wells Fargo alleges twelve causes
 2 of action under state law for Wells Fargo’s alleged “knowing provision of
 3 substantial assistance” to not only the fraud scheme perpetrated by the
 4 Defendants in this case, but also to a separate and unrelated fraud scheme
 5 perpetrated by the former operators of Apex Capital Group. (*Id.* ¶¶ 1–2).

6 On November 10, 2021, Wells Fargo filed the present Motion to Intervene,
 7 accompanied by a proposed Motion to Vacate the Court’s November 2019 Order.
 8 (Dkt. 153). Both the FTC and the Receiver filed oppositions in response, arguing
 9 that Wells Fargo hasn’t met its burden of demonstrating that intervention is
 10 warranted here. (Dkt. 167, 168). On January 5, 2022, Wells Fargo filed a reply in
 11 support of its motion. (Dkt. 169).

12 II. ANALYSIS

13 A. Article III Standing

14 The FTC argues that, as a preliminary matter, Wells Fargo lacks Article III
 15 standing to intervene in this case because its alleged injuries are merely
 16 hypothetical, and it cannot establish “a likelihood that an injury-in-fact will be
 17 redressed by a favorable decision.” (Dkt. 167 at 8–9 (quoting *San Diego United*
 18 *Port Dist. v. Monsanto Co.*, 309 F. Supp. 3d 866–67 (S.D. Cal. 2018)). Indeed, in
 19 any case where any relief is sought, “there must be a litigant with standing,
 20 whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of
 21 right.” *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017) (“[A]t

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 24 ² Court records filed in a related litigation are proper subjects of judicial notice.
 25 See *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*,
 26 971 F.2d 244, 248 (9th Cir. 1992). The Court, therefore, takes judicial notice of the
 27 Complaint, Notice of Related Case, Order of Transfer filed in the Wells Fargo
 28 Litigation, attached as Exhibits C–E to Wells Fargo’s Request for Judicial Notice.
 (Dkt. 154, Request for Judicial Notice (“RJN”), Exs. C, D, E). As the Court has not
 considered the remainder of the documents submitted in support of Wells Fargo’s
 RJN, its request for judicial notice as to those exhibits is DENIED AS MOOT.

1 the least, an intervenor of right must demonstrate Article III standing when it seeks
 2 additional relief beyond that which the plaintiff requests.”).

3 To establish Article III standing, Wells Fargo must demonstrate that it has
 4 suffered: 1) an injury in fact that is 2) fairly traceable to the defendant’s challenged
 5 conduct, and that is 3) likely to be redressed by a favorable ruling. *Lujan v. Defs.*
 6 *of Wildlife*, 504 U.S. 555, 560 (1992). Wells Fargo’s injury amounts to “having to
 7 defend itself against litigation that this Court authorized based on an invalidated
 8 legal principle,” namely allowing the FTC to seek equitable monetary relief under
 9 Section 13(b) of the FTC Act. (Dkt. 153-1 at 1). It argues that it may have to pay
 10 a monetary judgment contingent on the Receiver’s success in the separate Wells
 11 Fargo Litigation. (*Id.* at 21). But such speculative injury is insufficient to confer
 12 standing here. See *FTC v. Apex Cap. Grp., LLC*, No. CV189573JFWJPRX, 2022
 13 WL 1060486, at *3 (C.D. Cal. Mar. 10, 2022) (finding in case grounded in facts
 14 similar to those alleged here, that “injuries stemming from the cost or potential
 15 damages of litigation [in a separate suit] are insufficient to confer standing”); *San*
 16 *Diego Unified Port Dist.*, 309 F. Supp. 3d at 867 (holding “[t]he threat that
 17 Monsanto may be found liable in this action, . . . or future actions remains
 18 speculative” and insufficient to confer standing to assert counterclaims).

19 Wells Fargo also fails to establish “a likelihood that an injury-in-fact will be
 20 redressed by a favorable decision.” *Lujan*, 504 U.S. at 560. First, the Wells Fargo
 21 Litigation has already been filed and litigation is well underway—it commenced in
 22 July 2021 and the parties have already begun discovery. And second, even if this
 23 Court granted its request to vacate the November 2019 Order authorizing the
 24 Receiver to sue Wells Fargo under Section 13(b) of the FTC Act, the Receiver
 25 would still have the authority to continue its ongoing litigation against Wells Fargo
 26 to obtain a monetary judgment. In *AMG*, the Supreme Court held that the FTC
 27 lacks the authority to obtain equitable monetary relief under Section 13(b), 141 S.
 28 Ct. at 1352, but notably here, the FTC’s Complaint and request for a preliminary

1 injunction, as well as its request for a TRO, sought relief under not only Section
2 13(b), *but also* Section 5 of ROSCA, which authorizes the FTC to pursue monetary
3 relief on behalf of consumers for unfair or deceptive acts or practices. (See Dkt. 1
4 ¶ 1; Dkt. 5 at 1–2). The Court relied on ROSCA in granting in part the TRO and in
5 issuing the preliminary injunction against Defendants, the latter of which Order
6 explicitly authorized the Receiver to institute an action in federal court to recover
7 Defendants' assets. (Dkt. 11 at 1, 4; Dkt. 75 at 1–2, 17, 19). And the stipulated
8 orders imposing permanent injunction and judgment also relied on ROSCA. (Dkt.
9 126 at 1; Dkt. 127 at 1). Wells Fargo argues in response that reliance on ROSCA
10 to recover monetary relief is not permitted where the FTC never expressly pled
11 Section 19 of the FTC Act. (Dkt. 172 at 3). But the FTC's failure to specifically
12 invoke Section 19 does not bar its ability to recover under ROSCA. See *FTC v.*
13 *Credit Bureau Ctr., LLC*, No. 17 C 194, 2021 WL 4146884, at *2 (N.D. Ill. Sept.
14 13, 2021) (granting FTC's motion for judgment under ROSCA where, like here,
15 the original complaint pled ROSCA but not Section 19 of the FTC Act). Nor does
16 Wells Fargo's argument address how AMG affects the state law claims brought
17 against Wells Fargo that are not based on the FTC regulatory scheme. Thus, even
18 if the Court vacated its November 2019 Order to preclude the Receiver from
19 seeking to recover monetary damages under Section 13(b), the Receiver could
20 still pursue damages under ROSCA and the state law claims.

21 Wells Fargo fails to establish that it suffered a concrete injury redressable
22 through intervention, and therefore fails to establish it has Article III standing to
23 intervene in this case.

24 **B. Intervention as of Right**

25 Even if Wells Fargo could establish constitutional standing, Wells Fargo fails
26 to meet the Ninth Circuit's four-part test to determine whether a motion to
27 intervene should be granted as a matter of right: "(1) the motion must be timely;
28 (2) the applicant must claim a 'significantly protectable' interest relating to the

1 property or transaction which is the subject of the action; (3) the applicant must
2 be so situated that the disposition of the action may as a practical matter impair
3 or impede its ability to protect that interest; and (4) the applicant's interest must
4 be inadequately represented by the parties to the action." *Callahan v. Brookdale*
5 *Senior Living Cmtys., Inc.*, 42 F.4th 1013, 1020 (9th Cir. 2022) (*Wilderness Soc'y*
6 *v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011)).

7 The first element, timeliness, "is the threshold requirement for intervention."
8 *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). Timeliness hinges on
9 "three primary factors: (1) the stage of the proceeding at which an applicant seeks
10 to intervene; (2) the prejudice to other parties; and (3) the reason for and length
11 of the delay." *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016)
12 (internal citation and quotation marks omitted). Critically here, the Court entered
13 stipulated orders for permanent injunction and monetary judgment on May 20,
14 2019, and administratively closed the case on November 19, 2019. Over two
15 years passed before Wells Fargo filed its motion requesting intervention. That fact
16 alone weighs heavily against intervention. See *United States v. Washington*, 86
17 F.3d 1499, 1503 (9th Cir. 1996) ("Although the length of the delay is not
18 determinative, any substantial lapse of time weighs heavily against intervention.
19 If the court finds that the motion to intervene was not timely, it need not reach any
20 of the remaining elements of Rule 24.") (internal citations omitted); see also *Lee*
21 *v. Pep Boys–Manny Moe & Jack of Cal.*, No. 12-cv-05064-JSC, 2016 WL 324015,
22 at *5 (N.D. Cal. Jan. 27, 2016) ("The age of this case weighs against a finding of
23 timeliness, as this case was originally filed nearly three and a half years ago.").

24 The FTC argues that Wells Fargo was on notice that its interests were at
25 risk by at least October 22, 2019, when the Receiver filed a motion notifying the
26 Court of the conclusion of its investigation into a potential receivership estate
27 lawsuit against Wells Fargo and requesting permission to engage contingency
28 counsel to represent the Receiver in that action. (See Dkt. 136-1). In response,

1 Wells Fargo contends that even though the present action was filed against
 2 Defendants in 2018, Wells Fargo was never a party to that action, and it wasn't
 3 until April 22, 2021 that the Supreme Court issued its instructive ruling in *AMG*,
 4 and July 8, 2021 that the Receiver actually filed a complaint in the Wells Fargo
 5 Litigation. (Dkt. 153-1 at 13–14; Dkt. 172 at 6–7). But this still ignores the fact that
 6 Wells Fargo waited over six months after the *AMG* decision and nearly four
 7 months from the date the Wells Fargo Litigation commenced to file the present
 8 motion. And importantly, even if the Court considered a four to six month delay
 9 inconsequential, permitting intervention would prejudice the FTC, which is still
 10 empowered to pursue monetary judgment against Wells Fargo regardless of
 11 Section 13(b)'s applicability. If the Court granted the intervention request, the FTC
 12 would no doubt be forced to relitigate issues that have already been adjudicated
 13 in this case. As such, the Court does not find that the timeliness element has been
 14 satisfied.

15 As to the second element, Wells Fargo maintains that it has a protectable
 16 interest “in not having to defend itself against litigation” initiated by the Receiver
 17 based “on an invalidated legal principle.” (Dkt 153-1 at 16). However, Wells Fargo
 18 fails to demonstrate that it has a significant protectable interest in this case “[f]or
 19 the same reason that Wells Fargo’s litigation exposure fails to establish an injury
 20 sufficient to confer standing.” *Apex Cap. Grp., LLC*, 2022 WL 1060486, at *5. As
 21 discussed previously, the Receiver continues to properly assert claims for
 22 monetary damages against Wells Fargo, regardless of whether the Receiver can
 23 seek a monetary judgment under Section 13(b) of the FTC Act.

24 Finally, even if Wells Fargo could demonstrate that it has a protectable
 25 interest, it must also demonstrate that it would be unable to protect its interests if
 26 it isn't allowed to intervene here. Notably, nothing precludes Wells Fargo from
 27 raising the same arguments and defenses in the Wells Fargo Litigation as the
 28 ones it seeks to assert here through intervention. It remains unclear why the Court

1 would need to reopen a closed case, potentially undo stipulated orders and
 2 judgments, and vacate its previous order, just so Wells Fargo can belatedly argue
 3 here what it can more effectively argue in the case actually brought against it. As
 4 such, Wells Fargo hasn't met the third requirement, and the Court concludes that
 5 Wells Fargo isn't entitled to intervene as of right in this case.

6 C. Permissive Intervention

7 Wells Fargo argues in the alternative that it is entitled to permissive
 8 intervention under Rule 24(b). A district court has discretion to permit intervention
 9 when the movant presents "(1) an independent ground for jurisdiction; (2) a timely
 10 motion; and (3) a common question of law and fact between the movant's claim
 11 or defense and the main action." *Callahan*, 42 F.4th at 1022 (quoting *Freedom*
 12 *from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011)). As part
 13 of its discretion, the Court may also consider "whether intervention will prolong or
 14 unduly delay the litigation" and "whether parties seeking intervention will
 15 significantly contribute to the full development of the underlying factual issues in
 16 the suit and to the just and equitable adjudication of the legal questions
 17 presented." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th
 18 Cir. 1977).

19 The Court applies the same timeliness analysis as the one used in
 20 considering whether intervention as of right is warranted. See *League of United*
21 Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1308 (9th Cir. 1997) (citing *United*
22 States v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984)) ("In the context of permissive
 23 intervention, however, we analyze the timeliness element more strictly than we do
 24 with intervention as of right."). This case has long been closed, and even after the
 25 AMG decision was issued and the Wells Fargo Litigation commenced, Wells
 26 Fargo still waited at least four months to bring this motion. And given that Wells
 27 Fargo is already embroiled in that litigation, where it's free to raise the same
 28 arguments and defenses it seeks to raise here, the Court finds that permitting

1 intervention in this case is unnecessary and will result in yet further delay and
2 avoidable litigation.

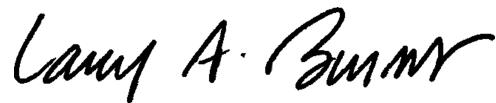
3 Accordingly, the Court exercises its discretion and denies Wells Fargo's
4 request for permissive intervention under Rule 24(b).

5 **III. CONCLUSION**

6 Wells Fargo's Motion to Intervene is **DENIED**. (Dkt. 153).

7 **IT IS SO ORDERED.**

8 Dated: September 30, 2022



9
10 **Hon. Larry Alan Burns**
11 United States District Judge

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

Dated: March 8, 2023

/s/ Brian D. Schmalzbach

Brian D. Schmalzbach